

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

9	EZRIEL RAPAPORT, as Trustee of the)	
10	RAPAPORT 2006 GRANTOR TRUST,)	
11)	
12	Plaintiff,)	2:10-cv-935-MMD-RJJ
13	vs.)	Consolidated with:
14	AVI SOFFER, an individual; DOES 1 through)	2:12-cv-57-MMD-RJJ
15	5 and ROE BUSINESS ENTITIES 1 through 5)	
16	inclusive,)	<u>REPORT & RECOMMENDATION</u>
17)	<u>OF UNITED STATES</u>
)	<u>MAGISTRATE JUDGE</u>
	Defendants.)	
)	

18 This matter came before the Court for a hearing on November 29, 2012. The hearing was
19 continued on December 13, 2012, and then December 14, 2012. At issue is Plaintiff's Fourth
20 Motion for Sanctions (#77). The Court has considered the Motion, the Defendant's Opposition
21 (#80); and the Plaintiff's Reply (#33). The Court has also considered the arguments and
22 representations presented at the hearing.

BACKGROUND

24 This case involves the purchase of an online trading network known as the Watch
25 Dealer's Network (WDN) by the Plaintiff from the Defendant, Soffer. WDN was intended to
26 operate in a manner similar to Amazon.com, with the distinction that it was for luxury watch
27 merchants. The Plaintiff Rapaport paid \$500,000.00 for all assets of WDN, and had control of
28 the business for approximately a year and a half. Both Rapaport and Soffer were members of the

1 WDN board. Around a year and a half after Rapaport paid Soffer, Soffer asserts that he took
 2 “emergency measures” as a board member of WDN in order to address what he believed was
 3 Rapaport’s inability to run the company. In response, Rapaport filed suit against Soffer on June
 4 16, 2010. Complaint (#1).

5 Discovery in this case closed on August 31, 2012. Order Setting Discovery Deadline
 6 (#65). However, a significant amount of the discovery has not been completed due to disputes
 7 between the parties. Those disputes prompted a series of discovery motions. *See* Plaintiff’s
 8 Second Motion for Sanctions Re Discovery (#71); Plaintiff’s Motion for Protective Order (#73)
 9 and Sanctions (#74); Defendant’s Request for Order to Compel (#78); and in the consolidated
 10 case No. 2:12-cv-57-MMD-RJJ, Soffer’s Motion to Deem Admissions (#30)

11 The Court, in an attempt to achieve some clarification on these discovery disputes, held a
 12 hearing on November 29, 2012. At that hearing it became apparent that the attorney present for
 13 Soffer, Guinness I. Ohazuruike, Esq., had not worked on and was not familiar with most of the
 14 present motions, nor was he assigned to Soffer’s case until after many of the events leading to the
 15 present disputes had already occurred. Accordingly, the Court continued the hearing on
 16 December 13, 2012, and ordered Efrem Rosenfeld, Esq., who was present for at least two of the
 17 depositions and thus had some familiarity with the case, Ohazuruike, and Avi Soffer to all be
 18 present for the continued hearing. Rosenfeld, Ohazuruike, and Soffer were all present for the
 19 December 13, 2012, hearing. Minutes of Proceeding (#85). The hearing did not conclude on
 20 December 13, 2012, and was continued again on December 14, 2012. *Id.* Rosenfeld,
 21 Ohazuruike, and Soffer were all present for the December 14, 2012, hearing as well. Minutes of
 22 Proceeding (#86). The Court heard the parties representations on the issues below.

23 A. Court Order to Pay \$1,500 in Sanctions

24 On June 11, 2012, the Court ordered Defendant Soffer to pay Plaintiffs \$1,500 in
 25 sanctions forthwith. Minute Order (#65). Over the course of three months, Plaintiff’s Counsel
 26 sent Soffer’s Counsel numerous emails and letters requesting the payment. Emails dated June
 27 27, 2012, July 17, 2012, July 21, 2012, and Letter dated August 22, 2012, attached as Exhibits 4-
 28 7, respectively, to Motion for Sanctions (#77). Plaintiff’s Counsel also spoke to Soffer’s Counsel

1 about the payment on August 22, 2012, and September 14, 2012. Motion for Sanctions (#77) at
 2 5, lines 21-24. During the September 14, 2012 phone call, Soffer's Counsel indicted that the
 3 check had been mailed. Motion for Sanctions (#77) at 6, line 1. By September 18, 2012, the date
 4 Plaintiffs filed their Motion (#77), the check had not been received. *Id.* However, the Check was
 5 in fact mailed on September 14, 2012, and it has since been received. Response to Motion for
 6 Sanctions (#80) at 2, lines 14-17.

7 **B. Failure to Properly Respond to Interrogatories**

8 As of May 21, 2012, Soffer had failed to respond to any of the Plaintiffs' Interrogatories
 9 which were served on March 6, 2012. Motion to Compel (#58) at 3. On June 11, 2012, the
 10 Court ordered Defendant Soffer to respond to the Plaintiffs' Interrogatories by June 20, 2012.
 11 Minute Order (#65). Accordingly, Soffer served his responses on June 20, 2012. Responses to
 12 First set of Interrogatories, attached as Exhibit 8 to Motion for Sanctions (#77). However, the
 13 Plaintiff was not satisfied with those responses, and sent a letter detailing the deficiencies on
 14 August 9, 2012. Letter dated August 9, 2012, attached as Exhibit 9 to Motion for Sanctions
 15 (#77). In response to the letter, on August 22, 2012, Soffer served Amended Responses to the
 16 Interrogatories. Amended Response to Interrogatories, attached as Exhibit 10 to Motion for
 17 Sanctions (#77). The Amended responses were also not satisfactory. On September 14, 2012, the
 18 parties discussed the matter further, "but it was clear that there would only be further delay."
 19 Motion for Sanctions (#77) at 6, lines 25-27. At the hearing on November 29, 2012, Soffer's
 20 Counsel represented that it would provide responses to the Plaintiff within 10 days. By the
 21 hearing on December 14, 2012, responses still had not been served.

22 **C. Failure to Properly Respond to Requests for Production**

23 As of May 21, 2012, Soffer had failed to respond to the Plaintiffs' Requests for
 24 Production. Motion to Compel (#58) at 3. On June 11, 2012, the Court ordered Defendant Soffer
 25 to respond to the Requests for Production. Minute Order (#65). The Plaintiffs assert that Soffer
 26 has still not properly responded to requests for production. Specifically, Soffer has not
 27 responded to a request for bank account records.

28 Additionally, on July 31, 2012, the co-defendant in consolidated case No. 2:12-cv-57-

1 MMD-RJJ, Martin Rapaport served written discovery requests on Soffer. Soffer has refused to
 2 respond to any of Martin Rapaport's written discovery, asserting that it was not timely.

3 **DISCUSSION**

4 The Plaintiffs are seeking the ultimate sanction with this filing. They have requested that
 5 the Court strike Soffer's pleadings. In the alternative, the Plaintiffs have requested Soffer be
 6 required to respond to discovery requests, return to Las Vegas to be deposed, pay for the time
 7 expended on trying to get Soffer to comply with each item of discovery, and any further sanctions
 8 the Court deems appropriate.

9 Here, after reviewing all the motions and exhibits before the Court, listening to the
 10 representations made at the hearing, and considering prior discovery disputes, it appears as
 11 though Soffer has completely failed to abide by the rules of discovery in this case. He avoided
 12 setting the date of his deposition for months, failed to properly participate in the deposition,
 13 refused to properly respond to most written discovery, delayed paying sanctions which were due,
 14 and has generally not been cooperative.

15 **I. Conduct Warranting Penalty**

16 A. Court Ordered \$1,500 Sanction

17 On June 11, 2012, the Court ordered Defendant Soffer to pay Plaintiff \$1,500. Minute
 18 Order (#65). As of September 18, 2012, the Plaintiff had not received the \$1,500. Motion for
 19 Sanctions (#77) at 4, lines 1-12. However, a check had been mailed on September 14, 2012, and
 20 was eventually received. Response to Motion for Sanctions (#80) at 2, lines 14-17.

21 Nevertheless, Rapaport argues that sanctions are still appropriate because Soffer only paid the
 22 \$1,500 after three months of communications and refusals to pay, and after it became readily
 23 apparent that Rapaport would be filing a motion for the payment. Reply to Motion for Sanctions
 24 (#82) at 2, lines 7-13.

25 At the hearing, Soffer's Counsel, Efrem Rosenfeld, Esq., explained that the reason the
 26 money had not been paid was because he was unaware of the sanction until September, at which
 27 point he paid it promptly. Rosenfeld blamed former associates at his law firm for the error, but
 28 ultimately took responsibility as an owner of his law firm.

1 Failing to keep track of the docket in this case is not a reasonable excuse. The sanction
 2 was ordered by the Court in June and was easily viewable on the docket. Additionally, a
 3 representative from Rosenfeld's firm was present when the Court ordered the \$1,500 sanction.
 4 Minute Order (#65). Soffer's counsel has a duty to followup and instruct Soffer to comply with
 5 orders of the Court. In this instance the \$1,500 was due forthwith. Soffer took three months to
 6 pay the sanctions, which is hardly forthwith. Thus Soffer and his Counsel violated a Court Order.

7 B. Responses to Interrogatories

8 Soffer sent Interrogatory Responses and Amended Responses to Plaintiff's counsel. As
 9 of September 14, 2012, the parties were still discussing the sufficiency of the responses. Motion
 10 for Sanctions (#77) at 6, lines 26-27. Based on the September 14, 2012, conversation, Plaintiff's
 11 Counsel asserts that "it was clear that there would be further delay." Motion for Sanctions (#77)
 12 at 6. Plaintiff's Counsel was correct. As of the December 14, 2012, hearing, despite Soffer's
 13 Counsel's representation that proper responses would be provided, no such responses had been
 14 produced. The Plaintiffs have requested that the Court impose sanctions because "none of
 15 Soffer's responses are properly made." *Id.* Even though all the interrogatories are in dispute, "for
 16 the convenience of the Court," the Plaintiff discusses only the more "critical interrogatories." *Id.*
 17 Specifically, the Plaintiff discusses Interrogatories Nos. 1, 4, 5, 6, 7, 12, 13, 14, 15, and 16. In
 18 the Response, Soffer asserts that he has "made reasonable efforts to provide sufficient
 19 responses" and the responses are "reasonable and sufficient." Response to Motion for Sanctions
 20 (#80) at 3, lines 11-22.

21 However, at the hearing, Soffer's Counsel agreed the responses were not sufficient,
 22 agreed to provide additional responses, and offered to work with the Plaintiff's Counsel, Mario
 23 Lovato, to give him "anything he needs." Soffer's Counsel was essentially requesting additional
 24 time to attempt to correct their complete failure to properly participate in discovery. Part of this
 25 complete failure is exhibited in the wholly insufficient responses to interrogatories.

26 1. *Interrogatory 1*

27 Interrogatory 1 requests a calculation of claimed damages. Motion for Sanctions (#77) at
 28 7. Soffer's Response states that discovery is ongoing and damages cannot be calculated at that

1 time, but will be supplemented later. *Id.* The Amended Response objects to the question as
 2 vague or ambiguous, states discovery is ongoing and thus the response may be amended, and the
 3 current calculation of damages is \$18 million dollars. *Id.* Neither the Response nor the Amended
 4 Response actually contain a calculation. At best, the Amended Response gives merely an
 5 amount. However, the Plaintiffs are seeking a calculation of how Soffer arrived at that amount.
 6 *Id.* Soffer provides no explanation concerning how his \$18 million response is reasonable or
 7 sufficient. Thus, the response and the amended response are neither reasonable nor sufficient.

8 2. *Interrogatory 4*

9 Interrogatory 4 requests a list of “all income, loans, or other monies that [Soffer has]
 10 received or taken from The WDN.LLC” Motion for Sanctions (#77) at 8. Soffer responded that
 11 he did not take any “personal income or loans.” *Id.* The Plaintiffs took issue with the fact that he
 12 “avoided the interrogatory” by discussing only “personal” income and loans. *Id.* Soffer amended
 13 his response by objecting, stating the request is vague and ambiguous, and additionally he has
 14 “never taken or received personal income, income, loans, or other monies from THE
 15 WDN.LLC.” *Id.* Soffer argues that his response was reasonable and sufficient, and the Plaintiffs
 16 are just upset that they did not get the answer they wanted. Response to Motion for Sanctions
 17 (#80) at 4.

18 Making personal attacks on the Plaintiff and Plaintiff’s counsel appears to be an ongoing
 19 trend with Soffer. See Deposition Transcript, attached as Exhibit 1 at page 32, to Second Motion
 20 for Sanctions (#71). Here, just as in his deposition, Soffer avoided the questions and asserts that
 21 the real deficiency is in the opposing side’s performance. Such a response is neither sufficient nor
 22 reasonable.

23 3. *Interrogatory 5*

24 Interrogatory 5 requests a list of all revenue or income Soffer received on behalf of WDN,
 25 including credit card payments. Motion for Sanctions (#77) at 8. Soffer responded that he did
 26 open a bank account, the account is now closed, and he has requested copies of all bank records
 27 from the bank. Motion for Sanctions (#77) at 9. The Amended Response is almost identical to
 28 the response except that it states Soffer did not receive revenue and/or income of the WDN.LLC.

1 *Id.* It is clear that both parties understand that this interrogatory is requesting information on
2 where the money in the closed bank account went. Additionally, it is hard to believe that the
3 bank has still failed to provide copies of its records to Soffer if he requested those copies in June
4 2012, when he was ordered to respond to the interrogatories. Soffer makes no argument for how
5 his response is sufficient, most likely because it is not.

6 4. *Interrogatory 6*

7 Interrogatory 6 requests all transactions or expenses Soffer incurred on behalf of the
8 WDN.LLC or in furtherance of his employment and ownership of The WDN.LLC. *Id.* Soffer
9 gave the same response to 6 as he did for 7. Motion for Sanctions (#77) at 10. This Interrogatory
10 is even clearer than Interrogatory 6, and the Plaintiff is plainly looking for where the money in
11 the closed account went. Again, Soffer provided no argument for why his response was
12 sufficient and that is likely because it is not.

13 5. *Interrogatory 7*

14 Interrogatory 7 requests identifying information for all bank accounts for The WDN since
15 January 2007. *Id.* Soffer objected that this Interrogatory is irrelevant because The WDN was
16 formed in January 2008 and the Plaintiffs had the opportunity to review 2007 bank records
17 during the due diligence period between September and December 2007. Motion for Sanctions
18 (#77) at 11. If the due diligence period for the parties was in 2007, it stands to reason that the
19 bank records from 2007, and maybe earlier, were relevant to the transaction at issue in this case.
20 This is particularly true considering that one of the disputes is whether Soffer misrepresented the
21 value of The WDN prior to the sales transaction. Additionally, the fact that the Plaintiff
22 reviewed documents prior to the onset of this litigation is irrelevant. Accordingly, Soffer did not
23 sufficiently respond to this interrogatory.

24 6. *Interrogatory 12*

25 Interrogatory 12 requests the amount of monthly subscription income for The WDN from
26 January 2007 through the date of the request. *Id.* Soffer responded that the Plaintiff, The
27 Rapaport Trust, owns a majority of and manages The WDN.LLC and therefore should have
28 possession of those records. *Id.* Additionally, Soffer asserted that he did not have that

1 information. *Id.* The Plaintiff on the other hand asserts that Soffer must have and “admits he
 2 has” this information because he sold a business that depended on the subscription money.
 3 Motion for Sanctions (#77) at 12. Based on the representations of Soffer’s Counsel at the
 4 hearing, Soffer either has, or has access to, a significant amount of information that has not been
 5 provided. Thus, due to Soffer’s complete failure to be forthcoming in the discovery process the
 6 Court has no way of determining whether Soffer is in possession of this information. Soffer has
 7 not only inhibited the discovery process, but also the Court’s ability to evaluate what little
 8 discovery has been provided.

9 7. *Interrogatory 13*

10 Interrogatory 13 is very similar to Interrogatory 7. *Id.* Soffer initially responded by
 11 directing the Plaintiffs to bates stamped documents 106-23. *Id.* In his Amended Responses, he
 12 stated that he does not have that information. Motion for Sanctions (#77) at 13. Yet in the
 13 hearing, his Counsel stated there was more information that could be produced. Based on the
 14 Amended Response and the hearing, the same analysis as for Interrogatory 12 applies here.

15 8. *Interrogatory 14*

16 Interrogatory 14 requests the number of watches offered for sale, by month, on the WDN
 17 website from January 2007 to the date of the interrogatory. *Id.* Soffer objects that the request is
 18 irrelevant because WDN’s business model focused on the number of memberships sold, not the
 19 watches actually sold. *Id.* Additionally, Soffer never kept track of that information and he would
 20 have to conduct a count, which would be burdensome and require access to the WDN website,
 21 which Soffer does not have. *Id.* However, based on Soffer’s deposition, it appears that Soffer
 22 does have access to the WDN website because he pays someone to run and maintain it. Second
 23 Motion for Sanctions (#71) at 16-27. Further, the number of watches sold is relevant because it
 24 is the profitability of the business that is at issue in this case. Soffer’s contention that counting
 25 sales would be burdensome is not substantiated by any facts. Thus, Soffer’s response is not
 26 sufficient.

27 9. *Interrogatory 15*

28 Interrogatory 15 seeks the number of requests for watches, by month, on the WDN

1 website from January 2007 to the date of the interrogatory. Motion for Sanctions (#77) at 14.
2 Soffer gave the same Response and Amended Response as given for Interrogatory 14. *Id.*
3 Accordingly, the analysis is the same.

4 10. *Interrogatory 16*

5 Interrogatory 15 seeks the number of watch transactions, by month, on the WDN website
6 from January 2007 to the date of the interrogatory. Motion for Sanctions (#77) at 15. Soffer gave
7 the same Response and Amended Response as given for Interrogatory 14. *Id.* Accordingly, the
8 analysis is the same.

9 C. Responses to Requests for Production

10 1. *Rapaport Requests for Production - Case 2:10-cv-935-MMD-RJJ*

11 The Plaintiffs assert that Soffer failed to properly respond to any of the requests for
12 production, but the “most crucial request” is Request No. 21. Motion for Sanctions (#77) at 16.
13 Request No. 21 seeks “financial records and documents showing income, revenue, or expenses
14 relating to The WDN.LLC” made by Soffer individually or on behalf of the company. *Id.* Soffer
15 agrees that he should produce this information but claims that the bank has failed to provide the
16 records to him. Response to Motion for Sanctions (#80) at 6. He asserts that because the bank
17 account was at Wachovia, which has since become Wells Fargo, the matter is complicated, but
18 he has made a reasonable and sufficient effort to obtain the documents. *Id.* The Requests for
19 Production were served in June 2012, and Soffer asserts he still has not received the documents
20 as of October 5, 2012. *Id.*

21 Soffer’s assertion that it is the bank’s fault is difficult to accept. Further, he fails to
22 elaborate on how the switch from Wachovia to Wells Fargo has caused a delay. Even when
23 given the opportunity at the hearing to elaborate on this assertion, Soffer’s Counsel was unable to
24 do so. Additionally it does not explain why Soffer has not produced bank account numbers or
25 the branch location where he opened the account(s). He has admitted opening the account and
26 thus should have this information. See Reply to Motion for Sanctions (#82) at 13-14, citing
27 Soffer Deposition, attached at Exhibit 1. It appears that Soffer is merely refusing to provide
28 information that he admits he should provide and is readily obtainable.

1 ...

2 2. *Martin Rapaport's Interrogatories and Requests for Production - Case*
 No. 2:12-cv-57-MMD-RJJ

3 Martin Rapaport is a named defendant in Case No. 12-cv-57-MMD-RJJ, which was
 4 consolidated with this case on August 15, 2012. Order Consolidating Cases (#70). On July 31,
 5 2012, Martin Rapaport served interrogatories and requests for production. Martin Rapaport
 6 Interrogatories and Requests for Production, attached as exhibits 11 and 12, respectively, to
 7 Motion for Sanctions (#77). Soffer did not respond to any of Martin Rapaport's written
 8 discovery requests.

9 The discovery cut off date in Case 12-cv-57, was August 13, 2012. The discovery cut off
 10 date in case 10-cv-935 was August 31, 2012. Soffer asserts that he did not respond to Martin's
 11 requests because the discovery cut off in 12-cv-57 was August 13, 2012, and thus he was only
 12 provided 13 days to respond. Response to Motion for Sanctions (#80) at 7. Further, he argues, if
 13 he had responded to the requests, it would have been a violation of the rules of procedure. *Id.*
 14 Soffer concludes by saying that he "has done nothing wrong by taking a courageous and
 15 principled stand in defense of the integrity and honor of the sacred temple of justice against the
 16 reckless abuse and callous desecration which Rapaport and his counsel deliberately and
 17 purposefully tried to inflict upon the sacred temple." *Id.*

18 In Reply, the Plaintiffs point out that the two cases have been consolidated due to the fact
 19 that Soffer's Counterclaim in the first-filed case is copied-and-pasted into the Complaint of the
 20 second-filed case. Reply to Motion for Sanctions (#82) at 15. Further, counsel from both sides
 21 have apparently been acting as though the later discovery deadline was the deadline for both
 22 cases. *Id.*

23 At the hearing, Soffer's counsel again admitted it was at fault and merely asked for more
 24 time to correct the error. However, this error was made approximately four months ago. Thus, if
 25 Soffer was sincere in his desire to cooperate, such cooperation would have take place months
 26 ago, not when his client is on the verge of being defaulted.

27 **II. Striking Pleadings**

28 Striking a party's pleadings "is so harsh a penalty it should be imposed as a sanction only

1 in extreme circumstances.” *Thompson v. Housing Authority of the City of Los Angeles*, 782 F.2d
 2 829, 831 (9th Cir.1986).

3 Rule 37 authorizes dismissal of a complaint, entry of default judgment, and awards of
 4 fees and costs as discovery sanctions. Generally, Rule 37 authorizes discovery sanctions where
 5 there has been willful noncompliance with a discovery order of the court. Also, courts have
 6 inherent equitable powers to dismiss actions or enter default judgments for abusive litigation
 7 practices. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987).

8 Due process requires that the sanctions for discovery abuses be just and that the sanctions
 9 relate to the claims which were at issue in the discovery order which is violated. *Wyle v. R.J.*
 10 *Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983). A district court must weigh five factors
 11 in considering such a penalty: “1) the public's interest in expeditious resolution of litigation; 2)
 12 the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public
 13 policy favoring disposition of cases on their merits and 5) the availability of less drastic
 14 sanctions.” *Id.* The Ninth Circuit affirms dismissal where at least four factors support dismissal
 15 or where at least three factors “strongly” support dismissal. *Hernandez v. City of El Monte*, 138
 16 F.3d 393, 399 (9th Cir.1998).

17 Dismissal need not be preceded by other less severe sanctions. It may be imposed where
 18 supported by the following factors: (1) the degree of willfulness of the offending party, (2) the
 19 extent to which the non-offending party would be prejudiced by a lesser sanction, (3) the severity
 20 of the sanction of dismissal relative to the severity of the discovery abuse, (4) whether any
 21 evidence has been irreparably lost, (5) the feasibility and fairness of alternative, less severe
 22 sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence
 23 to be admitted by the offending party, (6) the policy favoring adjudication on the merits, (7)
 24 whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney,
 25 and (8) the need to deter both the parties and future litigants from similar abuses. *See Aoude v.*
 26 *Mobile Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989).

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28

1 A. The public's interest in expeditious resolution of litigation and the court's need to
 2 manage its docket

3 Here, the public's interest in expeditious resolution of litigation and the court's need to
 4 manage its docket is clear. This case began approximately two years ago and Soffer has almost
 5 completely failed to properly participate in discovery. He has violated a Court Order, sent
 6 harassing written discovery, refused to cooperate in his own deposition, and failed to respond to
 7 written discovery properly propounded by the Plaintiff. Allowing Soffer additional time to
 8 correct his failures would be contrary to the public interest in an expeditious resolution of
 9 litigation as it would only prolong this already lengthy case. The Court would also suffer as it
 10 would have to continue facilitating the discovery in a case that should have been completed
 11 several months ago. Accordingly, these first two factors weigh in favor of striking the pleadings.

12 B. The risk of prejudice to the defendants

13 The risk of prejudice to the Defendant is unclear. By not cooperating properly in
 14 discovery, Soffer has failed to make evident how he will defend himself and what evidence he
 15 will use to support his defenses and counterclaims.

16 The Court finds that there was a high level of willfulness in Soffer's noncompliance. He
 17 refused to pay a fine until it was apparent the Court would be notified of his noncompliance. He
 18 refused to cooperate in his own deposition. He completely failed to properly respond to written
 19 discovery. Additionally, his attorneys made at least two intentional misrepresentations to the
 20 Court when they indicated they had not received responses to discovery requests from the
 21 Plaintiff.

22 These discovery abuses, which have been elaborated upon in the Court's other orders,
 23 have severely and completely prevented proper discovery. His abuses warrant a severe sanction,
 24 which in this case is default and dismissal of the counterclaim and the 2:12-cv-57-MMD-RJJ
 25 complaint

26 C. The public policy favoring disposition of cases on their merits

27 Ideally this case could be heard on its merits. Unfortunately, based on Soffer's conduct
 28 leading up to the hearing, the Court does not believe that hearing this case on the merits is

1 possible. Soffer refused to cooperate in discovery until it was clear he was in danger of having
2 his pleadings struck, and there is no indication that Soffer will actually cooperate should he be
3 given an additional opportunity to cooperate. Thus, this factor weighs in favor of striking the
4 pleadings.

5 D. The availability of less drastic sanctions

6 The Court has considered a number of less drastic sanctions and finds that none of them
7 feasibly nor fairly address the discovery abuses in this case. For example, a monetary sanction
8 alone would not be adequate. Based on the history of this case, it is questionable whether Soffer
9 would timely pay a monetary sanction. Money cannot address the time lost dealing with Soffer's
10 noncompliance. The time and expense the Plaintiff has already expended attempting to properly
11 litigate this case is significant, and it would severely prejudice the Plaintiff to expect him to incur
12 those costs again . Deeming improperly withheld facts would also not remedy the Defendant's
13 conduct at this point due to the volume and nature facts that have been withheld. Soffer has kept
14 both the Plaintiff and the Court in the dark about what facts even exist in this case. Deeming
15 facts admitted would not provide many of the facts at issue, such as the bank account information
16 Soffer has refused to produce.

17 Additionally, if a lesser sanction was imposed, the Plaintiff would be significantly
18 prejudiced. The Plaintiff has pursued this case diligently and properly only to be continuously
19 harassed and burdened by Soffer's refusal to cooperate in discovery. If the Court allowed the
20 case to proceed, the Plaintiff would have to incur duplicative costs and fees associated with
21 discovery, spend drastically more time in this litigation, and not see a resolution of this case for
22 years.

23 Finally, it would not be unfair to penalize Soffer for the discovery abuses. It was Soffer
24 who failed to pay the fine, Soffer who refused to cooperate in the deposition, and Soffer, who
25 refused to produce his bank account information. Soffer and his counsel are equally at fault for
26 completely failing to cooperate properly in discovery. Accordingly, the Court finds that Soffer's
27 discovery abuses are irreparable and this factor weighs in favor of striking the pleadings.

28 Thus, because at least four and likely five factors considered by the Ninth Circuit support

1 dismissal, the pleadings will be struck.

2 **RECOMMENDATION**

3 Based on the foregoing, and good cause appearing therefore,

4 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that:

5 1. the Amended Answer (#36) in case no. 2:10-cv-935-MMD-RJJ be stricken and
6 default entered;

7 2. the Counterclaim (#36) in case no 2:10-935-MMD-RJJ be dismissed with
8 prejudice; and,

9 3. The Complaint (#1) in case no. 2:12-cv-57 be dismissed with prejudice.

10 DATED this 31st day of December, 2012.

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13 ROBERT J. JOHNSTON
14 United States Magistrate Judge

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